Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–738 OF 1999
GOPAL SRI RAM, HAIDAR AND ABDUL HAMID MOHAMAD JJCA
2 JANUARY 2001

Civil Procedure *— Judgments and orders — Impeachment of — Deliberate fraud practised upon court — Court misled into making order for sale — Documentary evidence revealed flagrant breaches of statutes — Lack of uberrimae fides on part of litigant — Court would decline order for sale if appraised of true state of affairs — Whether order should be set aside*

Civil Procedure *— Jurisdiction — Defect in jurisdiction — Supreme Court allowed foreclosure order despite lack of jurisdiction — Whether jurisdictional issue could be raised in subsequent suit — — Whether res judicata applied*

Civil Procedure *— Res judicata — Issue estoppel — Issue litigated at Supreme Court — Supreme Court decision found to be contrary to established authority — Whether respondent should be allowed to plead res judicata to preclude appellant from re-agitating issue in later suit*

The respondent was a licensed moneylender. The appellants took a loan from the respondent whereby the respondent took a charge over a piece of land belonging to the appellants, held under a land office title. The appellants fell into arrears and the respondent proceeded to enforce the charge. An originating summons for foreclosure was taken out whereby the High Court made an order of foreclosure under which the land was to be sold by public auction. The appellants appealed to set aside the order for foreclosure on the ground that the High Court had no jurisdiction over the matter. The High Court set aside the order. The respondent then appealed to the Supreme Court. The court allowed the appeal. It was held that the judge was functus officio as the summons for foreclosure had been determined inter partes after a contest. The court found merit in the appellants argument that the High Court had no jurisdiction to make the order for foreclosure. But the court held the point to be no longer open to the appellants because of res judicata (see *Scotch Leasing Sdn Bhd (In receivership) v Chee Pok Choy & Ors* [1997] 2 MLJ 105 ('*Scotch Leasing (No 1)*')). While the respondent's appeal was pending before the Supreme Court, the appellants filed an action. The statement of claim was later amended as a result of decision of the Supreme Court. A plea of fraud was added. At the trial of the action, the appellants led evidence in support of their claim. The respondent did not call any evidence and was content to rest on a submission of no case to answer. The evidence of the appellants on the critical issues of fact in particular the obtaining of the order of foreclosure by fraudulent means remained unrebutted. The High Court dismissed the appellants' claim. The appellants appealed. It was submitted that the judge failed to undertake a judicial appreciation of the evidence and

was wrong in law to treat himself as bound by the judgment of the Supreme Court in *Scotch Leasing (No 1)*. The appellants' argument raised two principal issues in this appeal: (i) whether the decision of the Supreme Court in *Scotch Leasing (No 1)* as a matter of law precludes the appellants from seeking to set aside the order of foreclosure; and (ii) irrespective of the answer upon the first issue, whether the appellants had made out grounds upon which the order for foreclosure may be set aside.

Held, allowing the appeal:

(1) Whether res judicata in the wider sense should be permitted to bar a claim is a matter that is to be determined on the facts of each case, always having regard to where the justice of the individual and particular case lies. The court found that the justice of the present case demands that the decision in *Scotch Leasing (No 1)* ought not, in the interests of justice, to bar the appellants from re-agitating the issue of the jurisdiction of the High Court to make the order for sale in the initial foreclosure proceedings (see p 358E–F).

(2) It is obvious that the two propositions established by *Scotch Leasing (No 1)* are contrary to established authority. It would be most unjust to preclude the appellants to re-agitate the jurisdictional point purely on the strength of that case. The decision in *Scotch Leasing (No 1)* has for all practical purposes been overruled by the majority judgment in *Badiaddin v Arab-Malaysian Finance Bhd* [1998] 1 MLJ 393. It was therefore unjust that the malignant effects of that decision should be visited upon the heads of the appellants (see pp 358G, 359A–B).

(3) The effect of the order of the Supreme Court in *Scotch Leasing (No 1)* was to reinstate an order of the High Court that had earlier been set aside. This was because the respondents' appeal to the Supreme Court was merely a continuation of the proceedings before the High Court. Hence it was the jurisdictional competence of the High Court as the court of the first instance and not that of the Supreme Court with which the court was concerned in relation to the doctrine of res judicata. If the High Court lacked jurisdiction at the time it made the order for sale, it continued to lack that jurisdiction despite the views expressed by the Supreme Court. As such, it would be an affront to justice to permit the respondent to successfully plead res judicata in the second suit as that would tantamount to applying the editorial blue pencil across the mandatory provisions of s 260(2) of the National Land Code 1965 (see p 359B–C, F).

(4) A judgment may be impeached for deliberate fraud practised upon the court. The present instance was not a case where the trial judge negatived fraud after a thorough investigation of the allegation. The appellants' complaints were never looked into at

al1. The appellants' evidence was not challenged by the respondent. This was therefore a kind of case very exceptionally seen at the appellate level. It was therefore incumbent upon the court to draw such inferences as the undisputed facts admit (see pp 361B, 362F).

(5) The documentary evidence produced by the appellants revealed flagrant breaches of the Moneylenders Act 1957. There were also non-compliance with O 79 of the Rules of the High Court 1980. Since the respondent did not comply with O 79, it followed that its originating summons was fatally flawed. These matters, in particular the breach of the statute had the effect of rendering the respondent's originating summons a nullity (see pp 354I, 363B–C).

(6) The vital point in the whole case was that the respondent actively concealed all the relevant matters from the High Court when it applied for the order of sale. As a litigant moving the court, it was incumbent for the respondent to display uberrimae fides. The respondent having actively practised a serious deception upon the court ought not to have benefit of the judgment it had obtained. The respondent should not be permitted to profit from the fraud it perpetrated on the court (see p 366D–F).

(7) The judge had ample jurisdiction to act upon the evidence and to set aside the order for sale on the ground that it had been obtained by fraud. It was plain upon the undisputed documents in this case that the respondent deliberately misled the court into making the order for sale. Of equal clarity was the fact that the court would have declined the order for sale if it had been appraised of the true state of affairs. The appellants had succeeded in proving their case beyond a reasonable doubt (see pp 366H, 367F–G).

[Bahasa Malaysia summary

Responden adalah pemberi pinjaman wang berlesen. Perayu-perayu mengambil pinjaman daripada responden di mana responden telah mengambil satu gadaian ke atas sebidang tanah kepunyaan perayu-perayu di bawah pegangan hakmilik pejabat tanah. Perayu-perayu telah berada dalam keadaan tertunggak dan responden mula meneruskan untuk menguatkuasakan gadaian tersebut. Satu saman pemula untuk halangtebus telah dikeluarkan di mana Mahkamah Tinggi telah membuat satu perintah halangtebus di mana tanah tersebut haruslah dijual melalui perlelongan awam. Perayu-perayu telah membuat rayuan untuk mengetepikan perintah untuk halangtebus tersebut atas alasan bahawa Mahkamah Tinggi tiada bidang kuasa ke atas perkara tersebut. Mahkamah Tinggi telah mengetepikan perintah tersebut. Responden kemudian merayu kepada Mahkamah Agong. Mahkamah tersebut telah membenarkan rayuan itu. Telah diputuskan bahawa hakim adalah functus officio kerana saman untuk halangtebus telah diputuskan secara inter partes

selepas satu perbicaraan. Mahkamah mendapati adanya merit di dalam hujahan-hujahan perayu-perayu tersebut bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa untuk membuat perintah untuk halangtebus. Tetapi mahkamah telah memutuskan perkara tersebut tidak lagi terbuka kepada perayu-perayu kerana res judicata (lihat *Scotch Leasing Sdn Bhd (In receivership) v Chee Pok Choy & Ors* [1997] 2 MLJ 105 ('*Scotch Leasing (No 1)*')). Sementara rayuan responden masih menunggu penyelesaian di hadapan Mahkamah Agong, perayu-perayu telah memfailkan satu tindakan. Pernyataan tuntutan tersebut telah kemudiannya dipinda akibat dari keputusan Mahkamah Agong. Satu rayuan fraud telah ditambah. Di perbicaraan tindakan tersebut, perayu telah mengemukakan keterangan bagi menyokong tuntutan mereka. Responden tidak memberi sebarang keterangan dan berpuashati dengan penghujahan tiada kes untuk dijawab. Keterangan perayu-perayu mengenai isu-isu fakta yang kritikal khususnya perolehan perintah halangtebus melalui cara-cara fraud kekal tidak disangkal. Mahkamah Tinggi menolak tuntutan perayu-perayu. Perayu telah merayu. Telah dihujahkan bahawa hakim tersebut telah gagal memberi pertimbangan kehakiman akan keterangan tersebut dan adalah salah di sisi undang-undang untuk menganggap diri beliau sebagai terikat oleh penghakiman Mahkamah Agong dalam *Scotch Leasing (No 1)*. Hujahan perayu-perayu telah membangkitkan dua isu utama dalam rayuan ini: (i) sama ada keputusan Mahkamah Agong dalam *Scotch Leasing (No 1)* sebagai satu perkara undang-undang menghalang perayu-perayu daripada cuba untuk mengetepikan perintah halangtebus tersebut; dan (ii) tidak menghiraukan jawapan bagi isu pertama tersebut, sama ada perayu-perayu telah membuat alasan-alasan di atas yang mana perintah untuk halangtebus boleh diketepikan.

Diputuskan, membenarkan rayuan tersebut:

(1) Sama ada res judicata mengikut maksud yang lebih luas haruslah dibenarkan untuk menghalang sesuatu tuntutan merupakan perkara yang mesti ditentukan mengikut fakta-fakta setiap satu kes, selepas menimbangkan di mana letaknya keadilan kepada individu dan kes tertentu tersebut. Mahkamah memutuskan bahawa keadilan kes semasa ini menuntut supaya keputusan dalam *Scotch Leasing (No 1)* tidak seharusnya, demi kepentingan keadilan, menghalang perayu-perayu daripada menghujahkan semula isu bidang kuasa Mahkamah Tinggi untuk membuat perintah untuk jualan dalam prosiding permulaan halangtebus tersebut (lihat ms 358E–F).

(2) Ianya jelas bahawa kedua-dua proposisi yang ditetapkan oleh *Scotch Leasing (No 1)* adalah bertentangan dengan autoriti yang mantap. Adalah amat tidak adil bagi menghalang perayu-perayu untuk menghujahkan semula perkara bidang kuasa semata-mata atas sifat kukuh kes tersebut. Keputusan dalam *Scotch Leasing*

(No 1) telah bagi semua tujuan praktikal telah ditolak oleh penghakiman majoriti dalam *Badiaddin v Arab-Malaysian Finance Bhd* [1998] 1 MLJ 393. Adalah dengan itu tidak adil bahawa kesan tidak baik keputusan itu diletakkan pada perayu-perayu (lihat ms 358G, 359A–B).

(3) Kesan perintah Mahkamah Agong dalam *Scotch Leasing (No 1*) adalah untuk menghidupkan semula satu perintah Mahkamah Tinggi yang telah diketepikan pada awalnya. Ini adalah kerana rayuan responden-responden kepada Mahkamah Agong adalah hanya suatu penyambungan prosiding di hadapan Mahkamah Tinggi. Oleh itu mahkamah tersebut berhadapan dengan doktrin res judicata berhubung dengan keupayaan bidang kuasa Mahkamah Tinggi sebagai mahkamah pertama dan bukan Mahkamah Agong. Jika Mahkamah Tinggi ketiadaan bidang kuasa pada waktu ia membuat perintah untuk jualan, ia terus ketiadaan bidang kuasa meskipun pendapat yang dinyatakan oleh Mahkamah Agong tersebut. Oleh yang demikian, ia akan merupakan suatu penghinaan kepada keadilan untuk membenarkan responden merayu res judicata dengan jayanya dalam guaman kedua kerana ini adalah sama dengan mengenakan 'editorial blue pencil' terhadap peruntukan-peruntukan mandatori s 260(2) Kanun Tanah Negara 1965 (lihat ms 359B–C, F).

(4) Sesuatu penghakiman boleh dicabar kerana amalan fraud yang sengaja ke atas mahkamah. Keadaan semasa bukannya satu kes di mana hakim perbicaraan menidakkan fraud selepas penyiasatan teliti akan pendakwaan tersebut. Aduan perayu-perayu tidak pernah diberikan perhatian sama sekali. Keterangan perayu-perayu telah tidak dicabar oleh responden. Ini adalah dengan itu satu jenis kes yang jarang sekali dilihat di peringkat rayuan. Ianya adalah dengan itu terserah kepada mahkamah untuk membuat inferens yang sedemikian seperti mana yang diakui oleh fakta-fakta yang tidak dipertikaikan (lihat ms 361B, 362F).

(5) Keterangan dokumentari yang dikemukakan oleh perayu-perayu mendedahkan kemungkiran nyata akan Akta Pemberi Pinjaman Wang 1957. Terdapat juga ketidak-patuhan A 79 Kaedah-Kaedah Mahkamah Tinggi 1980. Oleh kerana responden tidak mematuhi A 79, didapati bahawa saman pemulanya adalah tidak sempurna dengan cara yang memudaratkan. Perkara-perkara ini, khususnya kemungkiran statut tersebut mempunyai kesan menjadikan saman pemula responden suatu pembatalan (lihat ms 354I, 363B–C).

(6) Perkara penting di dalam keseluruhan kes tersebut adalah bahawa responden telah secara aktif menyembunyikan semua perkara yang relevan daripada Mahkamah Tinggi ketika ia memohon untuk mendapatkan perintah jualan. Sebagai litigan yang mengusul mahkamah, adalah tanggungjawab responden untuk menunjukkan uberrimae fides. Responden tersebut setelah

mengamalkan dengan aktifnya suatu perdayaan yang serius ke atas mahkamah tidak seharusnya mendapat manfaat dari penghakiman yang telah pun diperolehi. Responden tidak seharusnya dibenarkan untuk mendapat keuntungan daripada fraud yang dilaksanakan olehnya ke atas mahkamah (lihat ms 366D–F).

(7) Hakim mempunyai bidang kuasa yang secukupnya untuk bertindak atas keterangan tersebut dan mengetepikan perintah untuk jualan atas alasan bahawa ia telah diperolehi secara fraud. Adalah jelas pada dokumen-dokumen yang tidak dipertikaikan dalam kes ini bahawa responden telah dengan sengaja memperdayakan mahkamah bagi membuat perintah untuk jualan. Hakikat yang sama jelas juga adalah bahawa mahkamah mungkin akan menolak perintah untuk jualan itu jika ia telah dinilaikan dari keadaan hal-perkara yang sebenarnya. Perayu-perayu telah berjaya dalam membuktikan kes mereka di luar keraguan yang wajar (lihat ms 366H, 367F–G).]

Notes

For cases on judgments and orders generally, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3438–3593.

For cases on defect of jurisdiction, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3684–3685 and 3814.

For cases on res judicata generally, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5076–5181.

Cases referred to

Arnold v National Westminster Bank Plc [1991] 2 AC 93 (refd)

Badiaddin v Arab-Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)

Bank Islam (M) Bhd v Ainin bt Abdullah & Anor [1998] 4 MLJ 132 (refd)

Baron Uno Carl Samuel Akerhielm v Rolf De Mare & Anor [1959] AC 789 (refd)

Carl-Zeiss Stiftung v Rayner and Keeler Ltd & Ors (No 2) [1966] 2 All ER 532 (refd)

Cheah Cheng Hoc v PP [1986] 1 MLJ 299 (refd)

Cheah Wong Nyan & Anor v Palaniappa & Ors [1935] MLJ 31 (refd)

Chief Kofi Forfie v Barima Kwabena Seifah [1958] 1 All ER 289 (refd)

Dayawati v Inderjit AIR 1966 SC 1423 (refd)

Edwards v Bairstow [1956] AC 14 (refd)

Essex County Council v Essex Incorporated Congregational Church Union [1963] 1 All ER 326 (refd)

Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers [1983] 1 MLJ 175 (refd)

Guddappa v Balaji AIR 1941 Bom 274 (refd)

Gulwant Singh v Abdul Khalik [1965] 2 MLJ 55 (refd)

Gurcharan Kaur v Rochi Silk Store [1959] MLJ 229 (refd)
Henderson v Henderson (1843) 67 ER 313 (refd)
Johnson v Gore Wood & Co 14 December 2000, unreported (refd)
Maharajah of Jeypore Gunapuram Deenbandhu Patnaik LR 32 IA 45 (refd)
Meenakshi Naidoo v Subramaniya Sastri LR 14IA 160 (refd)
Nasib Singh v Jamilah [1972] 1 MLJ 255 (refd)
Patch v Ward (1867) 3 Ch App 203 (refd)
Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487 (refd)
Sama Corp Sdn Bhd, Re; CI Holdings Bhd v Jabatan Pemegang Harta [1992] 2 MLJ 251 (refd)
Satish Chandra v Satish Kantha Roy AIR 1923 PC 73 (refd)
Scotch Leasing Sdn Bhd (In receivership) v Chee Pok Choy & Ors [1997] 2 MLJ 105 (refd)
Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd [1987] 1 MLJ 413 (refd)
Shibo Raut v Baban Raut (1908) 35 ILR Cal 353 (refd)
SP Chengalvaraya v Jagannath AIR 1994 SC 853 (refd)
Subchent Kaur v Chai Sau Kian [1958] MLJ 32 (refd)
Tan Teng Pan v Wong Fook Shang [1973] 1 MLJ 31 (refd)
Tan Tye, Re, Deceased [1936] MLJ 141 (refd)
Teja Singh v Rattan Singh [1961] MLJ 39 (refd)
United Asian Bank Bhd v Elgi Marka Sdn Bhd [1995] 1 MLJ 301 (refd)
Wasakah Singh v Bachan Singh (1931) 1 MC 125 (refd)

Legislation referred to

Evidence Act 1950 s 44
Moneylenders Act 1951 ss 16, 18, 21
National Land Code 1965 s 260(2)
Rules of the High Court 1980 O 79 rr 2, 3, 5

Appeal from: Civil Suit No D4–22–49 of 1993 (High Court, Kuala Lumpur)

M Segaran (*Syarikat M Segaran*) for the appellants.
TY Teh (*TY Teh & Partners*) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):**.** This appeal raises several interesting points of law. In the main, it has to do with the role of equity in adjectival law. At the heart of the appeal is the scope and application of the doctrine of res judicata.

This case has a long and chequered history, but it must be told. Otherwise the arguments of counsel cannot be understood. I will try and tell it as briefly as possible.

The respondent, Scotch Leasing Sdn Bhd, is a private limited company over which receivers and managers have been appointed. But its name is misleading. It is not a leasing company at all. It is, in fact, a licensed

moneylender. Its business is therefore regulated by the provisions of the Moneylenders Act 1951 ('the Act').

The story begins as long ago as January 1983. In that month, the appellants borrowed a sum of money from the respondent. It was a loan of RM150,000. Interest was charged, but the transaction was disguised in the form of an agreement to lease a fictitious item of moveable property. Additionally, the respondent took a charge over a piece of land. That land belonged to the appellants. In the language of the National Land Code 1965 ('the Code') they are its 'registered proprietors'. The land is held under a land office title. That fact has important consequences in this case.

From time to time, the appellants made payments to the respondent. After some time, they fell into arrears. The respondent then proceeded to enforce the charge. On 11 January 1986, it took out an originating summons for foreclosure. That summons came on for disposal inter partes before the High Court on 3 September 1991. The High Court made an order of foreclosure under which the land in question was to be sold by public auction.

Now that was quite wrong. Being a land office title, the application for foreclosure should have been made to the land administrator. Section 260(2) of the Code requires that to be done in mandatory terms. The section is jurisdictional. In other words, the High Court had no jurisdiction over the matter. The point is well settled. There are many decisions upon it. See *Tan Teng Pan v Wong Fook Shang* [1973] 1 MLJ 31; *Re Sama Corp Sdn Bhd; CI Holdings Bhd v Jabatan Pemegang Harta* [1992] 2 MLJ 251; *United Asian Bank Bhd v Elgi Marka Sdn Bhd* [1995] 1 MLJ 301; *Bank Islam (M) Bhd v Ainin bt Abdullah & Anor* [1998] 4 MLJ 132.

To resume the narrative, sometime after the order for foreclosure was made, the appellants applied to set it aside on the jurisdictional ground. On 17 September 1992, the High Court set aside its order. The respondent then appealed to the Supreme Court. That court allowed the appeal. Peh Swee Chin SCJ, who delivered the judgment of the Supreme Court, held that the judge was functus officio as the summons for foreclosure had been determined inter partes after a contest. He found merit in the instant appellants' argument that the High Court had no jurisdiction to make the order for foreclosure, but he held the point to be no longer open to the appellants because of res judicata. His judgment has been reported in *Scotch Leasing Sdn Bhd (In receivership) v Chee Pok Choy & Ors* [1997] 2 MLJ 105. I will refer to that case as *Scotch Leasing (No 1)*. This is how Peh Swee Chin SCJ dealt with the jurisdictional point:

> First, a jurisdiction point is no less an issue than other issues in civil litigation. If not raised at the hearing in the court of first instance or on appeal, it cannot be raised thereafter, for the doctrine of *res judicata* sets in.
>
> Res judicata has been explained before, eg see Asia Commercial *Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 (SC).
>
> When the jurisdiction point in question was not raised before the learned judge before he made the first order, when he heard the matter inter

parties, or at any rate, if it was not raised for review before the said order was perfected, the requirements of a proceeding in an adversarial system were complied with and satisfied, unless the learned judge exceptionally took the jurisdiction point on his own initiative, if he so minded, before the said order of sale was made. We mentioned the adversarial system because in it, a court generally would leave it to the parties in litigation to conduct their respective cases as best as they could without interference.

It is to be remembered in this connection that a superior court like the High Court is 'a court of unlimited jurisdiction in the course of contentious litigation' as stated by Lord Diplock in *Issacs v Robertson* [1984] 3 All ER 140 at p 143, when referring to a High Court as such a court in connection with the requirement that a High Court's order must be obeyed and could only be challenged in a direct application to set it aside. This was followed by the Supreme Court in *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal* [1994] 2 MLJ 601 (SC).

We may add that under s 114(e) of the Evidence Act 1950, one can presume that the High Court has such attributed jurisdiction unless rebutted. We say this in connection with our description of such a jurisdiction point as being ordinarily an issue in litigation.

If the learned judge had no jurisdiction on 17 September 1992 to hear the application dated 8 June 1992 to set aside the first order, the application to set aside could not have been entertained by the court in the first place. Thus, any legal argument in support of such application to set aside — should it proceed — ex necessitate could not have been entertainable, lying, as it did, outside the threshold of the court.

As a necessary consequence, this appeal is not properly before us — it being an appeal from an order made at a hearing which was an exercise in futility.

Whether the Supreme Court's decision in *Scotch Leasing (No 1)* is still good law is something that I will deal with at the appropriate place in this judgment. Let me complete the narrative first.

On 18 March 1993, while the respondent's appeal was pending before the Supreme Court, the appellants filed an action. The statement of claim was later amended as a result of decision of the Supreme Court. A plea of fraud was added. I will say something about it later. The appellants asked for various reliefs in their action. The most important of these are two declarations. First, that the charge over the appellants' land taken as security is null and void. Second, that the order of foreclosure dated 3 September 1991 — reinstated by the Supreme Court — is null and void and of no effect.

At the trial of the action, the appellants led evidence in support of their claim. The respondent did not call any evidence. Counsel for the respondent was content to rest on a submission of no case to answer. The evidence of the appellants on the critical issues of fact, particularly with regard to the payment of interest and the obtaining of the order of foreclosure by fraudulent means remained unrebutted. The documentary evidence produced by the appellants revealed flagrant breaches of the Act. Yet, the learned trial judge declined to grant the appellants the relief they

A sought. Instead, he dismissed their claim. The appellants have now appealed to us against this decision.

The learned judge's reasons for his decision are to be gleaned from his judgment. This is what he said:

> B The issue is whether the plaintiff can proceed with the present suit having regard to the decision of the Federal Court on 14 December 1996.
>
> In my view the plaintiffs by proceeding with this suit are trying to get around the decision of the Federal Court. The matter has been decided by the Federal Court and the plaintiffs have no choice but to follow the said decision.
>
> C Plaintiffs' counsel submitted that the Order of the High Court dated 3 September 1991 is not a bar to the plaintiffs' claim for a declaration that the money lending transaction is illegal, void and unenforceable. He submitted that the plaintiffs were not seeking to set aside the order of the Federal Court made on 14 December 1996.
>
> D With respect there is no merit in this submission. This court has no power to set aside the Order of another High Court. At any rate the Federal Court during the appeal did not rule that the Order of the High Court dated 3 September 1991 was null and void. I cannot see how the plaintiffs could proceed with the present suit in light of the decision of the Federal Court. To reopen the case would tantamount to deciding what was already decided by the Federal Court and to nullify the earlier decision of the High Court made on 3 September 1991. I cannot see how this court could be asked to make such a ruling.

E The learned judge then went on to disbelieve the oral evidence of the appellants' witness (the fifth appellant) on the execution of the documents that related to the fictitious leasing transaction.

F The appellants challenge the correctness of all findings made by the learned judge. It was submitted that the judge failed to undertake a judicial appreciation of the evidence, in particular the contemporaneous documents of the respondent. It was also submitted that the learned judge was wrong in law to treat himself as bound hand and foot by the judgment of the Supreme Court in *Scotch Leasing (No 1)*.

G The appellants' arguments raise two principal issues in this appeal. First, whether the decision of the Supreme Court in *Scotch Leasing (No 1)*, as a matter of law, precludes the appellants from seeking to set aside the order of foreclosure dated 3 September 1991. Second, irrespective of the answer upon the first issue, whether the appellants have made out grounds upon which the order of 3 September 1991 may be set aside.

H Let me take the first issue. This has to do with two aspects of the decision in *Scotch Leasing (No 1)*: its value and its effect. Now, to recall, the Supreme Court there held that although the issue as to the High Court's jurisdiction was one that had merit, it was no longer open to the appellants to rely on it. I am aware that I have already reproduced what Peh Swee Chin SCJ said in *Scotch Leasing (No 1)*, but the point is of such importance that I it is necessary to recall in a gist what was there said. It amounted to this. The appellants had not raised the jurisdictional point at the inter partes hearing of the summons for foreclosure. The order for foreclosure had been

perfected. The High Court was functus officio and therefore could not reopen the order on an application to set aside its earlier order. The doctrine of res judicata therefore applied to preclude the appellants from relitigating the issue of jurisdiction by way of an application to set aside the foreclosure order. If the High Court had no jurisdiction to grant the order, it did not have jurisdiction to set it aside.

With respect, so far as the jurisdictional point is concerned, the decision of the Supreme Court in *Scotch Leasing (No 1)* is no longer good authority. It does not, I think, survive the fatal blow dealt it by the Federal Court in *Badiaddin v Arab-Malaysian Finance Bhd* [1998] 1 MLJ 393. The majority view (Peh Swee Chin FCJ dissenting on the point) in that case supports three propositions. First, that although the High Court has unlimited jurisdiction, it nevertheless has no jurisdiction to make an order in breach of the express provisions of a statute (in that case, the Malay Reservation Enactment) or of the Federal Constitution. Second, that consent or waiver cannot confer jurisdiction upon a court. Third, the High Court, though lacking jurisdiction to make an order, nevertheless has jurisdiction to set aside such an order. I do not think that it requires much intellectual exercise to see that *Scotch Leasing (No 1)* was wrongly decided and is contrary to high authority on the point.

If reinforcement is required to support the proposition that neither consent nor estoppel nor waiver can confer jurisdiction upon a court that lacks jurisdiction, it may be found in the speech of Lord Reid in *Essex County Council v Essex Incorporated Congregational Church Union* [1963] 1 All ER 326 at p 330. The learned Law Lord addressed the point as follows:

> [I]n my judgment it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction.

See also, *Re Tan Tye, Deceased* [1936] MLJ 141; *Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175.

A perusal of the record of appeal reveals that a sustained submission was made before the learned judge on the impact of *Badiaddin's* case on *Scotch Leasing (No 1)*. However, the learned judge, without assigning any reasons, failed to deal with this point. Instead, he took a rather over simplistic view of the matter and treated the decision of the Supreme Court in *Scotch Leasing (No 1)* as irrevocably binding upon the appellant. The approach of the learned judge necessitates a discussion of the doctrine of res judicata.

Now, res judicata is not merely a technical rule of pleading. It is a doctrine of substantial justice. It is a process whereby justice is achieved procedurally by precluding a party from reagitating in subsequent proceedings a complaint or an issue that has, or could fairly have been disposed in earlier proceedings between the same parties or their privies. It is merely equity in action in the procedural arena. It is sometimes referred

to as the rule in *Henderson v Henderson* (1843) 67 ER 313. In that case, Wigram VC said:

> In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

The doctrine may thus be seen to encompass several categories. In its narrowest sense, res judicata, I think, refers to estoppel by record. It refers to the actual decision of the earlier action or proceeding. In its wider sense, it encompasses issues and causes of action that could justly and fairly have been equally adjudicated in the earlier suit or proceeding. This wider operation of the doctrine is sometimes referred to 'constructive res judicata'. It houses the twin concepts of issue estoppel and cause of action estoppel. Like the tree of which they form the branches, they are designed to ensure that there is finality in litigation.

Pausing for a moment, I think that it is essential to bear in mind that Wigram VC spoke these words in the Court of Chancery, and that the court he referred to was that court of which he was the Vice Chancellor at the time. I make mention of these matters in order to demonstrate that the doctrine of res judicata has its roots in equity and hence retains its discretionary nature that is common to all equitable doctrines.

Now, there is a dimension to the doctrine of res judicata that is not always appreciated. It is this. Since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result. And there is respectable authority in support of the view I have just expressed.

In *Carl-Zeiss Stiftung v Rayner and Keeler Ltd & Ors (No 2)* [1966] 2 All ER 532 at p 573, Lord Upjohn said:

> As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick* case ([1938] 4 All ER 747 at p 755; [1939] AC 1 at p 21)). *All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.* (Emphasis added.)

In *Arnold v National Westminster Bank Plc* [1991] 2 AC 93 at p 109, Lord Keith of Kinkel expressed the following view:

> In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. *One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result*, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl-Zeiss* case [1966] 2 All ER 536 at p 573, [1967] 1 AC 853 at p 947. (Emphasis added.)

In a later passage, I find Lord Keith saying:

> Estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process. In the present case I consider that abuse of process would be favoured rather than prevented by refusing the respondents permission to reopen the disputed issue.

These views were very recently reaffirmed by the House of Lords in *Johnson v Gore Wood & Co* (2000) (Unreported, speeches published on 14 December 2000). See in particular the speech of Lord Bingham of Cornhill, at pp 8–10 of the transcript.

On the authorities discussed thus far, the principle comes to this. Whether res judicata in the wider sense should be permitted to bar a claim is a matter that is to be determined on the facts of each case, always having regard to where the justice of the individual and particular case lies.

Adopting the approach that commends itself to me, I find that the justice of the present instance demands that the decision in *Scotch Leasing (No 1)* ought not, in the interests of justice, to bar the appellants from reagitating the issue of the jurisdiction of the High Court to make the order for sale in the initial foreclosure proceedings. There are three reasons that move me in this direction.

In the first place, it is obvious that the two propositions established by *Scotch Leasing (No 1)* are contrary to established authority. Take the first proposition. This is that an order made without jurisdiction and in defiance of a statutory provision can never be set aside in the same proceedings merely because it was made inter partes without the defendant raising the absence of jurisdiction. That proposition flies in the teeth of decisions of the Privy Council that hold to the contrary. See for example *Meenakshi Naidoo v Subramaniya Sastri* LR 14 IA 160; *Maharajah of Jeypore Gunapuram Deenbandhu Patnaik* LR 32 IA 45. Take the second proposition. It is that the High Court, having had no jurisdiction to make the order, equally had no jurisdiction to set it aside. This flies in the face of the judgment of the Privy Council in *Chief Kofi Forfie v Barima Kwabena Seifah* [1958] 1 All ER 289. That case and *Meenakshi Naidoo's* case were both referred to and applied by one of the majority judgments in *Badiaddin's* case. It follows that *Scotch Leasing (No 1)* is an authority of dubious weight.

A It would therefore be most unjust to preclude the appellants to reagitate the jurisdictional point purely on the strength of that case.

Now for the second reason. The decision in *Scotch Leasing (No 1)* has, for all practical purposes, been overruled by the majority judgments in *Badiaddin's* case. It is therefore unjust that the malignant effects of that B decision should be visited upon the heads of the appellants.

I now turn to the third and final reason. The effect of the order of the Supreme Court in *Scotch Leasing (No 1)* was to reinstate an order of the High Court that had earlier been set aside. This is because the respondents' appeal to the Supreme Court was merely a continuation of the proceedings before the High Court. Hence, it is the jurisdictional competence of the C High Court, as the court of first instance, and not that of the Supreme Court with which we are concerned in relation to the doctrine of res judicata. That much is clear from the authority of *Shibo Raut v Baban Raut* (1908) 35 ILR Cal 353, at p 359, where Stephen J said:

> D It was faintly suggested, however, on behalf of the appellants that as in the previous litigation the decision of the court of first instance was subsequently affirmed by this court, and as in the present litigation also the matter has been carried before this court, the plea of res judicata ought to be allowed, or in other words, that the true criterion is the competency of the court of appeal to decide the question. In my opinion this contention is not well founded. It is now firmly settled that it is the competency of the original court which decided E the former suit that must be looked to and not that of the appellate court in which the suit was ultimately decided on appeal: *Bharasi Lal Chowdhry v Sarat Chunder Dass* (1895) ILR 23 Cal 415, *Koylash Chandra De v Tarak Nath Mandal* (1897) ILR 25 Cal 571 and *Ram Gopal Mazumdar v Prasunna Kumar Sanial* (1905) 10 CWN 529.

F If the High Court lacked jurisdiction at the time it made the order for sale, it continued to lack that jurisdiction despite the views expressed by Peh Swee Chin SCJ. As such, it would be an affront to justice to permit the respondent to successfully plead res judicata in the second suit as that would be tantamount to applying the editorial blue pencil across the mandatory provisions of s 260(2) of the Code. For myself, I must confess my own G inability to rush in where angels fear to tread and to defy the doctrine of separation of powers so well entrenched in the Constitution.

For these reasons, I would resolve the first issue in the appellants' favour. In my judgment, the decision in *Scotch Leasing (No 1)* does not operate to bar the appellants from contending that the reinstated order of H the High Court was made without jurisdiction. The learned judge accordingly misdirected himself on the point.

With that, I turn now to consider the second issue. This, I must say at once, is independent of the first issue. In other words, even if the learned judge was right in treating the judgment in *Scotch Leasing (No 1)* as binding on the parties, the appellants were nevertheless entitled to attack the order I of the High Court as having been obtained by fraud. The emphasis is upon the order of the High Court, as only that is relevant. Once again, see *Shibo Raut v Baban Raut*.

I think I may begin this part of the case by referring to s 44 of the Evidence Act 1950. It reads as follows:

> Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under s 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion.

There is a most helpful commentary upon this section in *Evidence, Practice and Procedure* (2nd Ed) by Augustine Paul J. I am indebted to the author of that work for collecting what I think are all the relevant cases touching upon what the section requires before a judgment is impeached for fraud. The position was summarized by Edgar Joseph Jr J (as he then was) in *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413 at p 418 as follows:

> Now 'acts of the highest judicial authority,' though 'not to be impeached from within,' yet 'are impeachable from without,' for 'although it is not permitted to show that the court was mistaken, it may be shewn that they were misled. Fraud is an extrinsic collateral act; which vitiates the most solemn proceedings of courts of justice.' — per De Gray, CJ in *Duches of Kingston's Case* 2 Smith LC (13th Ed) 644 at p 651. 'Fraud' said Lord Buckmaster 'is an insidious disease, and if clearly proved to have been used so that it might deceive the court, spreads to infect the whole body of the judgment.' — in *Jonesco v Beard* [1930] AC 298 (HL) at p 301.
>
> On the other hand, in the Australian Case of *Price v Stone* [1964] VR 106. Gillard, J pointed out the necessity of proving a deliberate fraud upon the court as a foundation of this relief, and contrasted this with misleading or erroneous evidence falling short of this requirement.
>
> This last point comes in for emphasis in *Patch v Ward* (1867) 3 Ch App 203 and in the New Zealand Case of *Giffen v Leggatt* [1902] 2 NZLR 427.

In *SP Chengalvaraya v Jagannath* AIR 1994 SC 853 at p 854, the Supreme Court of India dealt with the equipollent provision in the Indian Evidence Act 1872 (which is in pari materia with our s 44). There is a useful passage in the judgment of Kuldip Singh J. It is as follows:

> It was up to the defendants, to plead and establish by gathering all the necessary materials, oral and documentary, that the plaintiff had no title to the suit properties. It is their duty to obtain an encumbrance certificate and find out whether the plaintiff had still a subsisting title at the time of the suit. The plaintiff did not prevent the defendants, did not use any contrivance, nor any trick nor any deceit by which the defendants were prevented from raising proper pleas and adducing the necessary evidence. The parties were fighting at arms length and it is the duty of each to traverse or question the allegations made by the other and to adduce all available evidence regarding the basis of the plaintiff's claim or the defence of the defendants and the truth or falsehood concerning the same. A party litigant cannot be indifferent and negligent in his duty to place the materials in support of his contention and afterwards seek to show that the case of his opponent was false. The position would be entirely different if a party litigant could establish that in a prior litigation his opponent prevented him by an independent, collateral wrongful act such as keeping his witnesses in wrongful or secret confinement, stealing his documents to

A prevent him from adducing any evidence, conducting his case by tricks and misrepresentation resulting in his misleading of the court. Here, nothing of the kind had happened and the contesting defendants could have easily produced a certified registration copy of Exh B-15 and non-suited the plaintiff; and it is absurd for them to take advantage of or make a point of their own acts of omission or negligence or carelessness in the conduct of their own defence.

B The principle then to be culled from the authorities is that a judgment may be impeached for deliberate fraud practised upon the court, and it is insufficient to show that a litigant merely convinced the court through misleading or erroneous evidence. Whether the test has been met in any given case must, I think, depend on the facts and circumstances of the C particular case. But there is some guidance in the cases as to how fraud may be established. There is a most useful passage in *Satish Chandra v Satish Kantha Roy* AIR 1923 PC 73 at p 76:

> Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who make them – proved by established facts or inferences legitimately drawn from those facts taken together as a D whole. Suspicions and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterous knave would escape.

E Counsel for the appellants has placed much reliance on several authorities in support of his argument that the respondents practised a fraud upon the court when seeking the order for sale in the foreclosure proceedings. It was incumbent on the learned judge to have carried out the task of investigating the claim. He however declined to do so on the narrow grounds earlier F adverted to. In these circumstances, I think that one of three courses is open to us. We may either remit the case to the same learned judge with a direction to him to make a finding on the point. This is not a satisfactory course to adopt. There is the risk of prejudice to the parties both in terms of additional costs and delay. Further, the learned judge, having expressed certain views on the oral testimony, puts the appellants at a distinct G disadvantage from a psychological standpoint. It will do little to produce apparent fairness that is so important in litigation. The other option is to order a retrial of the action before another judge. That is not a just solution either because of the already mentioned burdens of costs and delay. The third available option is for us to examine the evidence and make the H determination ourselves. In the very exceptional circumstances of this case, I find this third method to be the only practical solution in reality. And you will see in a moment why it is.

This is a case where the appellants' evidence was not subject to any serious challenge. In fact, much, if not all, of the evidence relied upon in support of the allegation of fraud was made up of the respondent's own I documents. It was merely a question of drawing the proper inferences from the undisputed evidence. There was a submission of no case that was made. Accordingly, the judge ought, in the absence of inherent incredibility or

inherent improbability to have accepted the evidence placed before him by the appellants. I take the law on the point as settled by the judgment of Elphinstone CJ in *Wasakah Singh v Bachan Singh* (1931) 1 MC 125 at p 128:

> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, *all the evidence given must be presumed to be true*. (Emphasis added.)

At the risk of repetition, I say that this is an exceptional case where we are in as good a position as the trial judge. It is merely a question of drawing the inferences that the evidence fairly admits. That, for historical and perhaps anomalous reasons, is a question of law. See, for example, *Edwards v Bairstow* [1956] AC 14; *Gurcharan Kaur v Rochi Silk Store* [1959] MLJ 229.

In adopting the course that now commends itself to me, I bear in mind that this is a case where fraud has been alleged. I have not lost sight of the salutary practice an appellate generally adopts in such a case. It is reflected in the words of Lord Jenkins in *Baron Uno Carl Samuel Akerhielm v Rolf De Mare & Anor* [1959] AC 789 at p 806:

> Their Lordships would add that they accept, and would apply in the present case, the principle that where a defendant has been acquitted of fraud in a court of first instance the decision in his favour should not be displaced on appeal except on the clearest grounds (see *Glasier v Rolls* (1889) 42 Ch D 436; 5 TLR 691).

But I hasten to add that the present instance is not a case where the trial judge negatived fraud after a thorough investigation of the allegation. This is a case where the appellants' complaints were never looked into at all. Neither was the evidence, in particular the documentary evidence, subjected to any scrutiny whatsoever. This is therefore a kind of case very exceptionally seen at the appellate level. It is therefore incumbent upon us to draw such inferences as the undisputed facts admit.

I begin with the cause papers filed with the High Court by the respondent in its application for an order for sale. The affidavit in support of the originating summons merely says that the appellants had created a charge to secure a loan of RM150,000 at the rate of 12%pa and that there had been default by the appellants. What is therefore striking is that nowhere in that affidavit is there any mention of the fact that the respondent is a licensed moneylender. The respondent actively concealed that fact.

Now, if the respondent had indeed made the requisite disclosure, it would have immediately triggered the provisions of O 79 of the Rules of the High Court 1980 ('the RHC'). It would have obliged the respondent to provide specific information on a number of matters, including the date of the contract of loan and particulars of the amount repaid and the amount due but unpaid. In other words, it was obligatory upon the respondent not

only to produce and exhibit a copy of the note or memorandum prescribed by s 16 of the Act but also to exhibit a copy of the appellants' account as required by s 21 of the Act. Of course, none of these matters were disclosed to the court by the simple method of concealing the truth, namely that the respondent was a licensed moneylender.

There are three other points that I think may be conveniently made now. The first is that O 79 r 5 of the RHC calls for mandatory compliance of the requirements of rr 2 and 3 where a moneylender's action is begun by originating summons. Since the respondent did not comply with the requirements of O 79 of the RHC, it follows that its originating summons was fatally flawed. An additional flaw that fatally infected the application for foreclosure was the non-compliance with the mandatory provisions of s 21 of the Act. These matters, in particular the breach of the statute, had the effect, in my view, of rendering the respondent's originating summons a nullity. If authority is required in support of this view, it is to be found in the judgment of the former Court of Appeal in *Teja Singh v Rattan Singh* [1961] MLJ 39, where Thomson CJ said:

> For myself I do not consider it necessary to examine the grounds of appeal in detail. The law in this country is perfectly well settled and has been settled since as long ago as 1941. It is no case of a moneylender being taken by surprise by a new technical defence. The law has been well known to the moneylending community since 1941 and was discussed as recently as 1956 in the case of *Ramasamy Chettiar v Wong Poh Fatt* [1960] MLJ 43 where Pretheroe J, after referring to the decision of Terrell J, in the earlier case of *Arjan Singh v Hashim Angullia & Ors* [1941] MLJ 55 held (I am reading from the headnote):
>
> > 'When a moneylender embarks on any proceedings in any court, a statement of his account as prescribed by s 21(1) of the Moneylenders Ordinance 1951, must be produced at the time the originating summons was filed. Non-compliance with this statutory requirement is an irregularity which the court cannot waive and will entitle the respondent to have the originating summons dismissed with costs.'
>
> It is beyond doubt that this case falls clearly within these words. The account was not produced when the originating summons was issued and that was fatal to any subsequent proceedings on that summons.

The appeal to the Supreme Court against the order setting aside the order for sale was a mere continuation of the original suit or proceeding (*Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 at p 496; *Dayawati v Inderjit* AIR 1966 SC 1423). It therefore did nothing to cleanse or to purify the foreclosure proceedings that were throughout tainted with illegality.

The second point that needs to be made concerns the state of the respondent's accounts. Now, s 18 of the Act requires a moneylender to keep regular accounts. If he does not do so, then he cannot enforce either the contract of loan or any security given for it. The authorities upon the point are legion. We were referred to some of them during argument. I will not go through them all here. But out of deference for the industry of counsel for the appellants, I shall refer to two of the more important decisions.

In *Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55, the plaintiff, a moneylender, produced a ledger at the trial to prove the defendant's account. The ledger merely showed three payments by the defendant, each of RM100. It did not show the other payments that were made by the defendant and admitted by the plaintiff as having been received by him. The former Federal Court held the plaintiff's claim failed. Thomson LP said (at p 57):

> In the circumstances it is impossible to resist the conclusion that this ledger is the book kept by the plaintiff under the provisions of s 18 and as it does not record the sums amounting to $1,500 paid by way of repayment prior to 27 September 1960, the clear effect of s 18 (if effect is to be given to it) is that the plaintiff's claim is unenforceable.
>
> For this conclusion there is no need to look further for authority than the judgment of the Privy Council in the case of *Kasumu v Baba Egbe* [1956] AC 539.

There is one further passage in the judgment of the learned Lord President which, I think, is of particular significance to the present instance. It is at p 58 of the report and reads:

> In the present case there can be no question of 'deciding nice questions of fact'. The plaintiff himself produced the book as that in which he kept his account of his transaction with the defendant. In the light of the whole of his evidence it is inconceivable that if his attention had been directed to the state of the book he would have offered any excuse such as mistake for failure to record payments which he strenuously asserted had never been made. And even if by some sort of tergiversation he had managed to produce, some such excuse it would not have been believed and in any event it would have availed him nothing for the provisions of s 18 are mandatory.

Next, in *Nasib Singh v Jamilah* [1972] 1 MLJ 255, the plaintiff moneylender brought an action to recover a loan made to the defendant. He succeeded in the sessions court. But that decision was reversed by the High Court. The plaintiff then appealed to the former Federal Court on the ground, inter alia, that the trial court had found the account maintained by the plaintiff under s 18 to be in order, and the intermediate appellate judge was therefore wrong in interfering with that finding. The Federal Court, while differing from the approach taken by the High Court, nevertheless affirmed his decision and dismissed the appeal. There is a passage in the judgment of the learned Chief Justice of Malaya in which he deals with the statement of account in that case. It is at p 257 of the report. It merits reproduction. It reads:

> I now turn to the respondent's account as entered in the appellant's books, wherein the president found, as he said, no flaw as regards compliance with the requirements of s 18. Payment of interest is, of course, a transaction relating to a debt sought to be enforced by action, within the provisions of sub-s (2). Hence any failure to keep a proper account of payments of interest on a loan must render the claim unenforceable. Entering payment on a date when no payment was in fact made is, in my opinion, as serious a non-compliance with the provisions of sub-s (1) of s 18 as the entry of a wrong or fictitious amount. Even a cursory inspection of the respondent's

> account on p 31 of Exh P2 and p 71 of Exh P3 reveals an extraordinary and incredible fact — that all of the 21 alleged payments of interest were entered as made punctually by the debtor on the due date, in fair weather or foul, over a period of more than 3 years. More incredible still is the fact that, according to the appellant's two books produced, every one of his scores of debtors was recorded as having made prompt payment of interest invariably on the due dates whenever interest was paid.

At p 258 of the report, he concludes the point as follows:

> In short, enough has been said, in my opinion, to show that any inspection of the appellant's account books must lead to an inevitable conclusion. Counsel on his behalf concedes frankly, as they must in this case, that there is no gainsaying a legitimate inference. The book entries themselves provide intrinsic evidence that the respondent's account contained false entries relating to the payment of interest. The accounts of other debtors provide corroborative evidence that for all payments of interest the true date of payment was disregarded when the entries were made. Such being the case the appellant had clearly failed to comply with the provisions of s 18 and this appeal must be dismissed.

That brings me to the present case. The respondent's documents produced at the trial reveal its account in respect of the appellants to be in hopeless disorder. According to para 7 of the affidavit in support of the respondent's application for the order for sale, the total amount (inclusive of principal and interest) due on the charge as at 15 February 1985 is said to be RM138,634 with further interest accruing on the balance of the principal sum of RM116,134 at the rate of 12%pa from 16 February 1985 to the date of realization. However, that is contradicted by the respondent's letter of 25 March 1991 addressed to the fifth appellant. In that letter, the respondent alleges not a loan, but a leasing agreement on which a sum of RM150,000 plus interest at the rate of 12% was outstanding. This latter statement cannot be correct. For, on the strength of its own affidavit, the respondent had conceded receiving a sum in excess of RM40,000 from the respondents.

Further, the statement of account produced by the respondent reveals ten payments of RM4625 each, and one payment of RM2616. That produces a total of RM48,866. The statement of account reveals that all the first of these eleven repayments was made on 16 February 1983, and that each of the subsequent repayments were made on the 16th day of each succeeding month, with the last payment being made on 16 December 1983. It really amounts to this. The appellants were exceptionally prompt paymasters who made payment of each instalment of principal and interest on the same day of each month no matter the state of the weather. The entries in the respondent's statement of account are therefore as incredulous as those in the statement of account produced by the plaintiff in *Nasib Singh v Jamilah*. It follows that the respondent's statement of account was false. I would recall the words of the learned Lord President in *Gulwant Singh v Abdul Khalik* and apply them here. For, here too, the accounting documents were produced by the respondent, but unlike *Abdul Khalik*'s case, the respondent here led no oral evidence. So, no question of

affording a possible explanation for the extraordinary state of the accounts arises on the facts of the present appeal. It follows that here too there is no question of deciding any nice questions of fact. All that is required is an examination of the undisputed documents produced by the respondent. That in itself is sufficient to put paid to the respondent's case.

I now turn to the third and final point that calls for mention. It has to do with s 16 of the Act. That section, by way of paraphrase, strikes down a contract of loan and any security therefor absent a note or memorandum in writing in accordance with the terms of the section. That the section is mandatory and admits of no exceptions is illustrated by *Subchent Kaur v Chai Sau Kian* [1958] MLJ 32. In that case, the plaintiff, a registered moneylender, moved the court for an order that certain lands charged to her by the defendant be sold to realize the amount due under the charge. No note or memorandum of the moneylender's contract was given to the defendant. Smith J, held that the contract for the repayment of the money lent and the security given by the borrower were unenforceable and granted a declaration to that effect.

In the present case, there is an express admission by the respondent in correspondence that there is no note or memorandum. It follows therefore that both the loan and the charge were unenforceable. Nothing more need be said upon the point.

The vital point in the whole case is that the respondent actively concealed all these matters from the High Court when it applied for the order for sale. As a litigant moving the court, it was incumbent for the respondent to display *uberrimae fides*. That much is settled by the decision of the Supreme Court in *Cheah Cheng Hoc v PP* [1986] 1 MLJ 299. The respondent, having actively practised a serious deception upon the court, ought it to have benefit of the judgment it had obtained? I think not. In my judgment, the respondent should not be permitted to profit from the fraud it perpetrated on the court. To the respondent I would cite the words of Beaumont CJ in *Guddappa v Balaji* AIR 1941 Bom 274, at p 275:

> No court will allow itself to be used as an instrument of fraud, and no court, by the application of rules of evidence or procedure, can allow its eyes to be closed to the fact that it is being used as an instrument of fraud. The legal maxim is *ex turpi causa non oritur actio*. Once the court finds that the plaintiff is seeking its assistance to enable him to get the benefit of what is a fraud, the court refuses to assist him. If, as a result of such refusal, the defendant is left in possession of some advantage derived from his own fraud, that is not due to any action on the part of the court.

The learned judge had ample jurisdiction to act upon the evidence and to set aside the order for sale on the ground that it had been obtained by fraud. I have already adverted to the relevant authorities on the point earlier in this judgment. I pause now to mention one other on the subject that I consider helpful. It is *Cheah Wong Nyan & Anor v Palaniappa & Ors* [1935] MLJ 31. In that case, Whitley J entertained an action to set aside a judgment fraudulently obtained in an earlier suit. He said (at p 32):

> The court undoubtedly has jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose, the proper remedy

being an original action and not a rehearing. *Cole v Langford* (1898) 2 QBD 36 and *Priestman v Thomas* (1884) 9 PD 210. In the latter case a compromise was effected in an action in the Probate Division under which a certain will was admitted to probate. Afterwards it was discovered that the will was a forgery and an action was brought against the parties who had propounded the will claiming that the compromise might be set aside on the ground of fraud. The jury having found that the compromise was procured by fraud, judgment was given setting aside the compromise. One of the earliest pronouncements of this principle was made by Lord Coke in the *Duchess of Kingston's Case*, (1776) 2 Sm LC 12th Ed at p 762 where he observed that acts of the highest judicial authority though not to be impeached from within yet are impeachable from without for although it is not permitted to show that the court was mistaken it may be shown that they were misled. 'Fraud is an intrinsic collateral act which vitiates the most solemn proceedings of courts of justice. It avoids all judicial acts, ecclesiastical or temporal.' Accordingly, as stated in *Spencer Bower on Actionable Misrepresentation* (2nd Ed) p 358, when both parties collude and conspired to deceive the court judgments have at the suit of a stranger interested been set aside on proof of the requisite facts. It would thus appear clear that the plaintiffs who are admittedly interested strangers are entitled to have this judgment set aside if they can satisfy the court that it was obtained by fraud and collusion.

In a later passage, Whitley J quoted the following statement of law relating to the degree of proof of fraud by Lord Cairns in *Patch v Ward* (1867) 3 Ch App 203 at p 207:

> The fraud there spoken of must clearly, as it seems to me, be actual fraud, such that there is on, the part of the person chargeable with it the malus animus, the mala mens putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him… I apprehend the fraud, therefore, must be fraud which you can explain and define upon the face of a decree, and that mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated or overestimated, is not the kind of fraud which will authorise the court to set aside a solemn decision which has assumed the form of a decree signed and enrolled.

It is plain as daylight upon the undisputed documents in this case that the respondent deliberately misled the court into making the order for sale. Of equal clarity is the fact that the court would have declined the order for sale if it had been appraised of the true state of affairs. It is difficult to imagine a clearer case for the inference of fraud. In other words, the appellants have succeeded in proving their case beyond a reasonable doubt.

Applying the well established principles to the facts of this appeal, it is beyond doubt that the charge of fraud has been brought home. In these circumstances, the failure of the learned judge to appreciate the nature of the jurisdiction he was called upon to exercise constitutes a serious misdirection warranting appellate interference.

For the reasons already given, I would allow this appeal and set aside the orders made by the learned judge. There shall be judgment for the appellants as prayed for in the foot of their statement of claim. If there are any further consequential orders required by the appellants for the disposal

of the action, they shall be obtained before the registrar on a summons. The respondent must pay the costs of this appeal and of all proceedings in the High Court. The deposit shall be refunded to the appellants.

My learned brothers Haidar and Abdul Hamid Mohamad JJCA have seen this judgment in draft and have expressed their concurrence with the reasons herein.

Appeal allowed.

Reported by Jafisah Jaafar